debtor died without personal assets, and no relief against, or accounting by, the administrator being sought.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 709.]

2. Appeal and Error (§ 1036 (5)*)—Harmless Error.—Error in permitting dismissal as against the administrator of suit to subject deceased's lands to a judgment is harmless, the heir making the same defense set up by administrator.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 587.]

3. Judgment (§ 491*)—Collateral Attack—Execution—Time of Return—Statute.—Under Code 1904, § 3220, providing that process, whether original, mesne, or "final," shall be returnable within 90 days of its date, execution returnable at a later date is not merely voidable but void, and its invalidity can be set up in suit to enforce the judgment.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 549, 550.]

Appeal from Circuit Court, Giles County.

Suit by Thomas J. Pearson against H. G. Johnston and others. Decree for complainant, and defendant Johnston appeals. Reversed, and bill dismissed.

W. B. Snidow, of Pearisburg, for appellant.

Williams & Farrier, of Pearisburg, and *Jackson & Henson,* of Roanoke, for appellee.

M. C. McCORKLE & SON *v.* KINCAID et ux.

Sept. 20, 1917.

[93 S. E. 642.]

1. Contracts (§ 176 (2)*)—Written Contract—Construction by Court.—Construction of a written contract for the sale of growing timber held for the court.

[Ed. Note.—For other case see 3 Va.-W. Va. Enc. Dig. 409.]

2. Appeal and Error (§ 1064 (2)*)—Harmless Error—Instruction.—Where a contract for the sale of growing timber gave the landowners at least two peeling seasons to secure the tanbark on the trees, so that the action of the lumbermen in felling them sooner was a breach of contract, in the landowners' action for the breach an instruction that the jury could determine the meaning of the contract, after considering the writing itself and all evidence, to find whether it was the intention of the parties that the landowners should have two peeling seasons, etc., was harmless as to the lumbermen.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 600.]

3. Evidence (§ 413*)—Parol Evidence Affecting Writing.—Conver-

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

sations and agreements between landowners and lumbermen, antecedent to a contract for the sale of growing timber, so far as they were in conflict with the written contract, were inadmissible to vary or contradict it; but, if its meaning was doubtful, the surrounding circumstances and the condition and avowed purposes of the parties, as well as the subject-matter of the contract, might be proved by parol testimony, to enable the court to determine its meaning.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 713 et seq.]

4. Logs and Logging (§ 3 (15)*)—Sale of Growing Timber—Breach of Contract.—Where a contract for the sale of growing timber provided that the lumbermen should have two years within which to manufacture and remove the timber, and that the landowners reserved the tanbark on the chestnut oak trees, which were to be felled and peeled by the landowners at such time during the peeling seasons as would not be inconvenient to the lumbermen for the manufacture of the trees, the landowners were entitled to at least two peeling seasons within which to fell the trees and secure the bark, it being practicable to remove tanbark only during April, May, and June, so that the action of the lumbermen in felling the trees before the two peeling seasons had elapsed was a breach of the contract, entitling the landowners to recover as damages the fair value of the tanbark of which they were deprived.

[Ed. Note.—For other cases, see 16 Va.-W. Va. Enc. Dig. 1211, 1212.]

5. Logs and Logging (§ 3 (10)*)—"Merchantable Timber."—"Merchantable timber," as the term was used in a contract for the sale of growing timber, included such timber as was ordinarily used for sale or manufacture in the particular locality, and is not such logs as that, when cut into lumber, will produce any or all of the grades of lumber known and recognized as merchantable timber in the lumber mills.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Merchantable. For other cases, see 16 Va.-W. Va. Enc. Dig. 1212.]

6. Damages (§ 62 (4)*)—Logging Contract—Avoidable Consequences.—Where lumbermen left growing timber covered by the contract of sale, which should have been taken out of the woods, the landowners could not recover for the entire value of such timber; but, if the logs were utilized by them, or could have been utilized by reasonable diligence, any amounts realized, or which could have been realized, should be set off against their damages.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 212.]

7. Logs and Logging (§ 3 (14)*)—Contract for Sale of Growing Timber—Reversion of Timber Unremoved.—Where a landowner sells

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

his timber, and receives the full purchase price, on condition that the timber be severed and removed within a limited time, all such time ber, though paid for, remaining on the property at the end of the time limit, reverts to the landowner.

[Ed. Note.—For other cases, see 16 Va.-W. Va. Enc. Dig. 1214.]

8. Logs and Logging (§ 3 (13)*)—Contract for Sale of Growing Timber—Deduction for Lumber Used in Buildings.—Where a contract for the sale of growing timber gave the lumbermen the right to erect all buildings necessary in the manufacture and removal of the timber, the buildings to revert to the landowners when the operation was finished, and the lumbermen put very inferior lumber into such buildings, only the actual value of such lumber in the logs, and not the average price paid the landowners for all the logs, could be deducted by the lumbermen for the lumber that went into the buildings.

[Ed. Note.—For other cases, see 16 Va.-W. Va. Enc. Dig. 1212.]

9. Logs and Logging (§ 3 (7)*)—Contract for Sale of Growing Timber—"Buildings."—Docks or platforms running out on a level with the mill floor, on which lumber was taken on cars and stacked for drying, constructed for the convenience of the lumbermen, and of no appreciable value to the landowners, were not "buildings," within the meaning of a contract for the sale of growing timber, providing that the lumbermen had the right to erect all buildings necessary in the manufacture and removal of the timber, such buildings to revert to the landowners on completion of the operation, so that the landowners were entitled to be paid for the lumber used in their construction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Building. For other cases, see 16 Va.-W. Va. Enc. Dig. 1212.]

Error to Circuit Court, Lee County.

Suit by B. F. Kincaid and Martha E. Kincaid against M. C. McCorkle & Son. To review a judgment for plaintiffs, defendants bring error. Reversed, and case remanded for new trial.

R. T. Irvine, of Big Stone Gap, and *C. R. McCorkle*, of Wise, for plaintiffs in error.

Bullitt & Chalkley, of Big Stone Gap, and *Pennington & Pennington*, of Pennington Gap, for defendants in error.

SUTHERLAND et al. *v.* GENT.

Sept. 20, 1917.

[93 S. E. 646.]

1. Appeal and Error (§ 1005 (3)*)—Review—Findings—Questions for Jury.—In ejectment whether plaintiff showed that the land de-

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.